

United States
Circuit Court of Appeals
For the Ninth Circuit ✓

NORTH SIDE CANAL COMPANY, LIMITED,
a corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a corporation,
Appellee.

PETITION OF APPELLEE FOR REHEARING

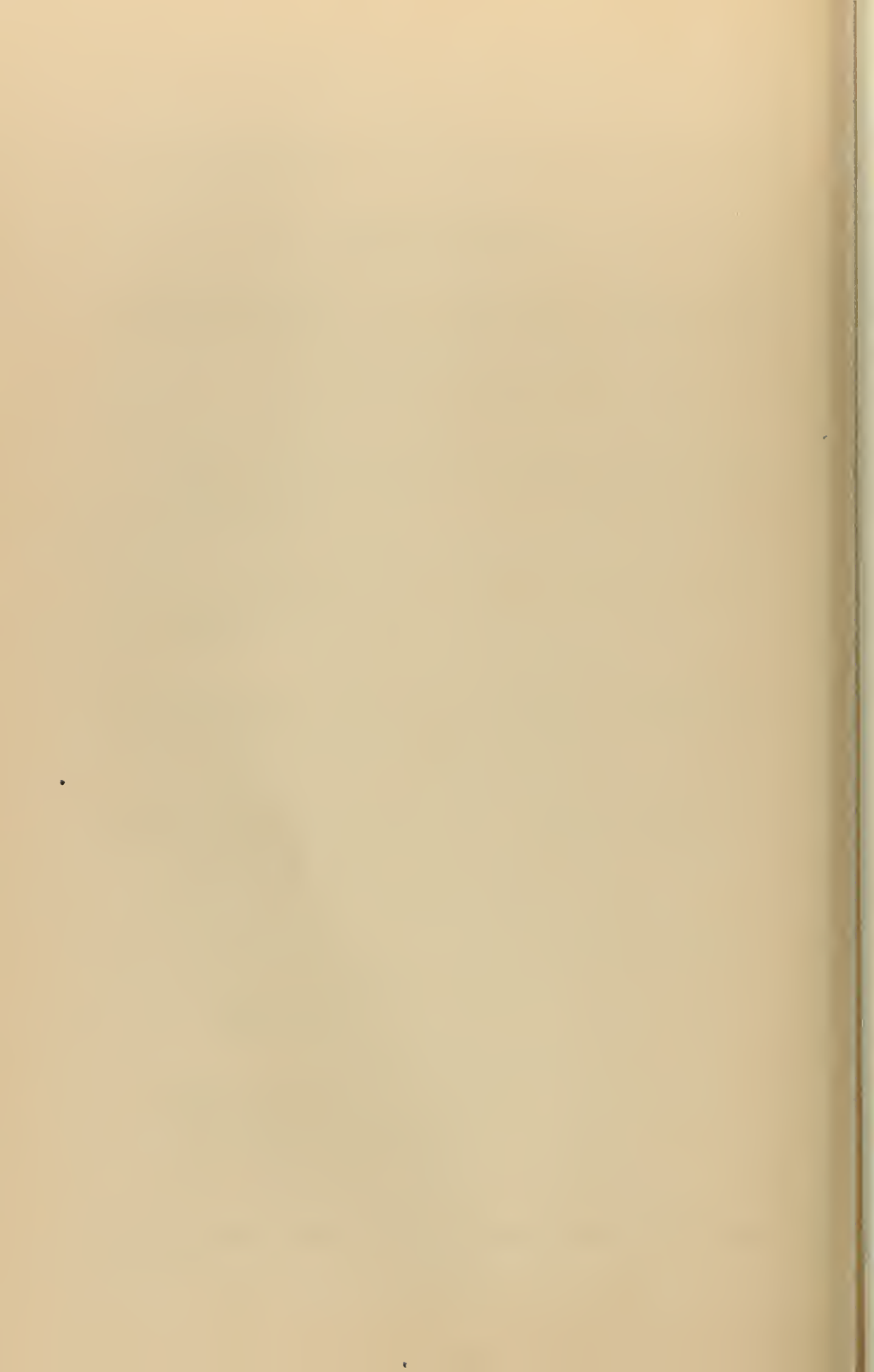
*Upon Appeal from the District Court of the United
States for the District of Idaho, Southern
Division*

EDWIN SNOW,
Residence: Boise, Idaho;

A. F. JAMES,
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*Attorneys for Appellee,
Idaho Farms Company.*

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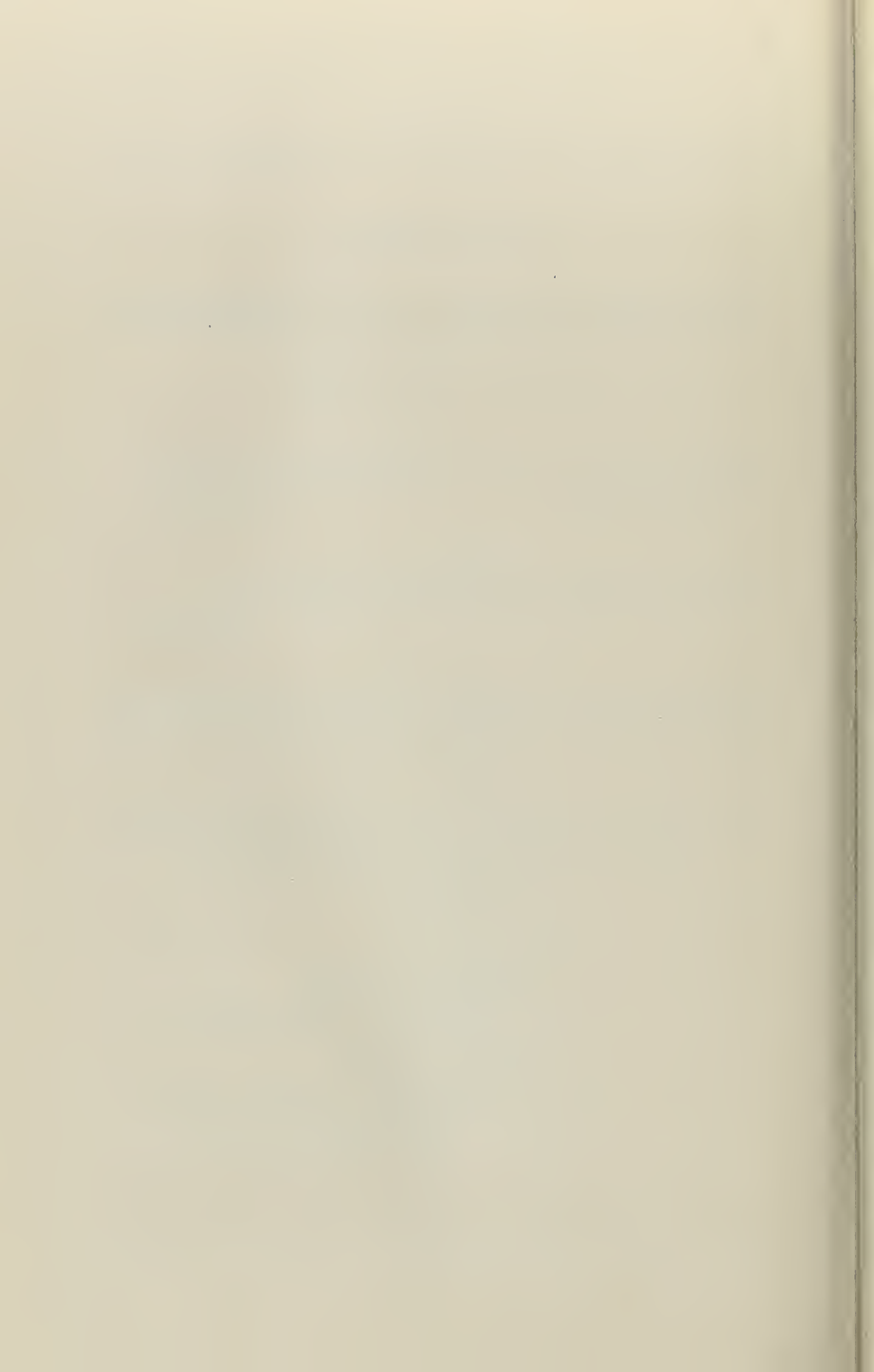
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In deciding this case, the court considered itself bound by the very recent decision of the Supreme Court of Idaho in the case of North Side Canal Company, Limited, v. Idaho Farms Company, . . . Pac., . . ., (Rehearing denied December 2, 1939) which involved the identical basic question presented here. In its opinion, this court said:

“The point upon which the state court rested its decision is purely one of local law concerning which that court speaks with conclusive authority.”

However, the conclusion reached by this court makes it imperative that, if oppressive delays and

costly future appeals be avoided, the court express itself on one further point in controversy. This point likewise involves a local statute, but one that has never been construed by the Supreme Court of Idaho and indeed could not be conclusively construed by it on the aspect here presented:

After this suit had been brought by appellee in the federal court to quiet its title to the lands in controversy as against the maintenance liens herein asserted by the appellant canal company, the latter brought suit in the state court against appellee to foreclose its *1935 maintenance lien*. Except for the commencement of such suit, the 1935 maintenance lien would admittedly have been barred by limitation. Section 41-1905, I. C. A., relating to appellant's maintenance lien, provides as follows:

“No lien provided for in this chapter binds any land for a longer period than two years after the filing of the statement mentioned in Section 41-1903 unless proceedings be commenced *in a proper court* within that time to enforce such lien” (Emphasis ours).

The court below rejected appellant's evidence of the commencement of these suits on the ground that under the circumstances and while this litigation was pending in the federal court the state court in which the action was commenced was not “*a proper court*” in which to commence the foreclosure within the meaning of Section 41-1905, I. C. A. By such ruling,

it vindicated and asserted its own exclusive jurisdiction with respect to the *res*. The trial court's ruling was assigned as error by appellant (Specification of Error No. 15, p. 17, appellant's brief). The matter is fully discussed in appellee's brief (page 92, et seq.).

It would have been wholly unnecessary for this court to consider this point if its conclusion on the fundamental question involved had been the same as that reached by the trial court; but since its conclusion on the fundamental question involved has been wholly different, in view of the very late decision of the Idaho Supreme Court, then the point becomes highly material and no mention of the matter occurs in the court's opinion. The case is reversed on the fundamental point discussed; that is, on the ground that in accordance with the view of the Supreme Court of Idaho, the appellee has no lien at all, but is the owner of the property. So this court not having expressed its view as to whether appellant's action to foreclose its 1935 maintenance lien was in the circumstances here presented begun "in a proper court", it will again be necessary that this cause be reviewed on appeal unless this court determine the matter now. We, therefore, request that a rehearing be granted or that without such rehearing the court amplify its opinion to cover the point here presented. It should perhaps be mentioned that appellant's maintenance lien for the year 1936 has since the trial of this cause likewise lapsed by limitation unless its lien has been preserved by foreclosure suit in the

state court while this cause has been pending and while, as we think, the controversy as to these liens was wholly within the jurisdiction of the federal court.

In support of the decision of the trial court on the point under discussion, we respectfully urge that the pertinent query is whether a foreclosure suit begun in the state court, which necessarily involves an irrepressible conflict of jurisdiction with the federal court, can be said to be "a proper court" within the meaning of Section 41-1905, I. C. A. No good purpose would be served by repeating the argument set forth on this point on pages 92 to 99, inclusive, of appellee's brief.

Respectfully submitted,

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We, the undersigned, counsel for appellee herein, do hereby certify that in our judgment the foregoing petition for rehearing is well founded; and that it is not interposed for delay.

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